United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B/S

76-1172

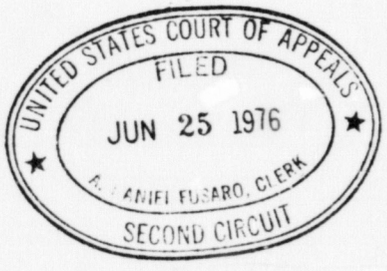
To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee -against- BERNARD TURNER, Defendant-Appellant.	Docket No. 76-1172

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the court's failure in its charge to define attempt is error mandating a reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Dudley B. Bonsal, D.J.) entered April 5, 1976, convicting appellant after a jury trial of one count of attempted bank robbery, in violation of 18 U.S.C. §2113(a), and sentencing him to the custody of the Attorney General for eight years.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on the appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Trial Evidence

On December 18, 1975, Joanne Martinkovic, a part-time teller for two months with the Bowery Savings Bank, was working at her station on the main concourse of the bank, located at 34th Street and Seventh Avenue (12-13, 21*). At about 2:40 p.m., while attending to a female customer, she noticed appellant, a few feet away, walking toward her window. Appellant walked with one hand at his side and the other inside his jacket. He was not carrying either a bag or a briefcase (13-14, 33, 44, 48).

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* Numbers in parenthesis refer to pages in the trial transcript dated February 18, 1976.

Bypassing the "snake" line designed to regulate entry to the tellers' windows, appellant walked directly to Ms. Martinkovic's window and asked her for some change. The teller directed appellant to get on line behind the other customers waiting to be served, and continued with her transaction (13-14, 33-35).

A few seconds later, appellant reappeared at the window.* Ms. Martinkovic directed her customer to the side and turned to wait on appellant (14). Appellant turned toward her and said: "Don't panic. I got a gun. I'll start shooting. I don't care. You'll be responsible for everybody getting hurt. Put all your money in the bag" (15). Appellant displayed no weapon, and his hands were obscured from view by the partition between the customer and teller (45-46, 48).

Ms. Martinkovic told appellant she did not have a bag for money and she asked instead whether she should put the money in an envelope. Appellant agreed with her suggestion and repeated his statement that he had a gun (15-16). Ms. Martinkovic took out a grey envelope and a package of $20 bills. She showed appellant the bills, and he said, "Good. More." The teller continued to fill the envelope with $50 and $100 bills and some "bait money" from the drawer; at the

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* Ms. Martinkovic testifed that as appellant approached her window the second time, she noticed again that he had one hand inside his jacket (53).

same time she also depressed the silent alarm button located in the cash drawer (16-17).

Ms. Martinkovic completed filling the envelope and clipped it shut. Instead of ordering her to hand over the money, however, appellant
the envelope "under the counter." Since the counter was solid, and delivery under the counter was obviously impossible, appellant's directive was a request that the money be placed outside his reach (49-50, 54). Ms. Martinkovic misunderstood appellant's command to remove the envelope and she placed it on top of the counter (54). Appellant then repeated his instruction to place the envelope under the counter, and Ms. Martinkovic dropped it and held it between herself and the counter (19, 54).

After complying with appellant's directive, Ms. Martinkovic first noticed two guards, responding to her alarm, approach her window from "far away" (19, 54). The guards stopped for a moment at a distance, and then continued walking in her direction (54). Appellant asked the teller to talk to him as if he was a regular depositor "in that payment order account" (19). Ms. Martinkovic asked appellant, "Would you like to open up our payment order account?" (20). At that moment, some two minutes after appellant's request to place the envelope under the counter, the two security guards came up to the window, one behind and one next to appellant, and asked the teller what was going on (20, 50-51). Appel-

lant told Ms. Martinkovic to say that nothing was happening. She said nothing for awhile, but when her unit supervisor came by, the teller told the supervisor and the guards that appellant had tried to rob her (20, 59).*

The guards immediately apprehended appellant. When appellant removed his hands from his coat pocket he revealed a small bottle with a pinkish liquid. A frisk by the security guards uncovered no weapons on appellant's person (65, 70-71).

B. The Court's Charge on Attempt

Following the people's case, defense counsel moved for a judgment of acquittal, inter alia, because the evidence was insufficient to show that appellant had consummated an attempt to rob Ms. Martinkovic, and instead showed a "half-attempt and then a withdrawal or discontinuance of the attempt by the defendant" (76). The Court denied the motion, finding that there was a jury question on "intimidation and on the other elements" (78).

In its written request to charge, the Government urged the Court to submit to the jury the following definition of "attempt":

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* Robert Antonio, one of the security guards, testified to a different sequence of events. On direct the guard testified that as he approached appellant, he heard him state: "I said keep it low" (65). On cross-examination, after first stating that "Keep it low" were the exact words appellant used, he changed his mind and decided that he had heard appellant say "I said keep it under the counter" (69). The officer did not remember hearing any conversation regarding a payment order account (74).

> An attempt is an act done in part execution of an unlawful purpose and design; it is an act done with intent to commit a crime but failing to effect its commission. Preparation to commit a crime is not an attempt. The law considers as an attempt only those acts which not only tend to the commission of the crime, but which carry the project so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference resulting in a failure to consumate the crime.*

Defense counsel, quoting and adopting this definition, also urged the Court to charge that "the jury might consider whether they might be dealing with someone who had not even consummated an attempt (79)." Defense counsel further urged that appellant's direction that the teller put the envelope under the counter might be regarded as an abandonment or voluntary withdrawal of his plan (80).

The Court replied:

> I don't see that in this case. I am not sure I am going to charge that in haec verba. What I am going to do is to deny all these requests except as charged . . .
> (80)

In his summation, defense counsel noted that, even according to the Government witnesses, appellant never demanded that the money in the envelope be turned over to him, but in-

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* See Government's request to charge, set forth as "D" in appellant's separate appendix.

stead directed that the money be put under the counter (99). He stated that this evidence "suggests either that the fellow never wanted the money in the first place, or else that after two seonds of foolishness, that perhaps we can get money from a bank with some kind of impunity, he thought better of it" (100).

In its charge to the jury, the Court listed the following elements which the Government was required to prove beyond a reasonable doubt in order to convict appellant of attempted robbery:

> 1. That on or about December 18, 1975, the Bowery Savings Bank was a bank whose deposits were insured by the Federal Deposit Insurance Corporation.
>
> You remember the lawyers stipulated that in fact those deposits are insured, so you don't have to worry about that. Everybody agreed with that.
>
> 2. That on or about December 18, 1975, the defendant attempted to take money from the bank which was in the care of the bank; attempted to take money from the bank.
>
> 3. That the attempt to take money was from the person or presence of one or more persons other than the defendant.
>
> And here, as I recall the evidence, I am not sure there is a dispute here, the Government contends the attempt was to take money from Miss Martinkovic, the teller at the bank, who testified before you this morning.
>
> The fourth element the Government must prove beyond a reasonable doubt is that the defendant attempted to accomplish this bank robbery by force, violence or intimidation.
>
> (113-114)

* * * * *

> Finally, the final element which the Government must prove beyond a reasonable

> doubt is was the defendant here, Mr. Turner, acting knowingly, wilfully, unlawfully, in other words, that he had the criminal intent here to attempt to rob the bank.
>
> (115)*

The Court also proceeded to define intimidation and criminal intent (114, 115). However, in no portion of the charge did the Court define or explain the meaning of the word "attempt," or the conduct sufficient to constitute an attempt.

Following the charge, the Assistant United States Attorney, unsure whether the Court had charged an attempt, requested a charge that the Government was not required to prove that the defendant succeeded in getting any money (121). The Court repeated its instruction that since appellant was charged with an attempt to rob the bank, that it was immaterial whether the attempt succeeded, but again failed to define what proof was required to establish an attempt.

Following its deliberation, the jury found appellant guilty of the single count of attempted bank robbery. On April 5, 1976, appellant was sentenced on the jury's verdict to eight years' imprisonment.

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* The complete charge is set forth as "C" in appellant's separate appendix.

ARGUMENT

THE COURT'S FAILURE IN ITS CHARGE TO DEFINE ATTEMPT IS ERROR MANDATING A REVERSAL.

Prior to summation and charge, the Government submitted the following definition of the essential element of attempt in its requests to charge:

> An attempt is an act done in part execution of an unlawful purpose and design; it is an act done with intent to commit a crime but failing to effect its commission. Preparation to commit a crime is not an attempt. The law considers as an attempt only those acts which not only tend to the commission of the crime, but which carry the project so near its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference resulting in a failure to consummate the crime.
>
> Taken from charge of Judge Reeves in United States v. Coplo[illegible] aff'd., 185 F.2d 629, 633 (2d Cir. 1950).*

Following his suggestion that the jury be instructed to consider whether "they might be dealing with someone who had not even consummated an attempt" (79), defense counsel quoted and expressed approval of the Government's request that attempt be defined. Yet despite the explicit requests of both

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*See also People v. Buffum, 256 P.2d 317, 321 (Cal. 1953), quoted in Mims v. United States, 375 F.2d 135, 148 n.40 (5th Cir. 1967), for similar definition of attempt.

the Government and defense that attempt be defined and explained, the court denied all requests "except as charged" and proceeded with a charge which totally omitted any definition of attempt, and which failed in any intelligible way to inform the jury of its obligation to determine whether appellant's acts had proceeded sufficiently to constitute an attempt. The court's failure to instruct on an essential element of the crime charged was fundamental error, mandating reversal.

The fundamental purpose of a charge is to inform the jury as to its function: the determination of the facts, and the application of the law as charged by the court to the facts found. United States v. Persico, 349 F.2d 6 (2d Cir. 1965); see Bollenbach v. United States, 326 U.S. 607, 612 (1946). To fulfill this function, it is absolutely essential that the charge inform the jury in an intelligible manner of the elements of the alleged crime which the jury must find to be proved beyond a reasonable doubt in order to convict. United States v. Howard, 506 F.2d 1131 (2d Cir. 1974); United States v. Clark, 475 F.2d 240 (2d Cir. 1973). Where the meaning of the essential statutory elements is not obvious to a layman, the "statute requires some definition of the words which may not be left to the jury." United States v. Gilliland, 288 F.2d 796 (2d Cir.) (Hand, J.), cert. denied sub nom. Apex Distributing Co. v. United States, 368 U.S. 821 (1961); see Kibbe v. Henderson, slip op. 3081, 3089-

3091 (No. 75-2128) (2d Cir. April 8, 1976); United States v. Howard, supra, 506 F.2d at 1133 n.3. Indeed, as this Court recognized in Kibbe, the failure to explain an essential element of the crime is an error of constitutional dimension.

There is simply no question that attempt is a legal term of art requiring some definition. Mims v. United States, 375 F.2d 135, 148 (5th Cir. 1967). Thus, in Mims, where the court found plain error in the failure to submit or define attempt to the jury, it was noted:

> The appellant was entitled to have the question of whether there was an attempt to enter the bank for the purpose of robbing it submitted to the jury under appropriate instructions covering, among other things, the elements for this type of offense and the test for determining whether the conduct of the participants had gone beyond the intent and preparation stage and had reached the point where an overt act had been committed directly tending to effect the commission of the substantive offense.

See also United States v. Clay, 495 F.2d 700, 707 (7th Cir.), cert. denied, 419 U.S. 937 (1974) (necessity of submitting attempt with instruction covering whether conduct reaches point where overt act directly tending toward commission of offense and corroborative of criminal purpose has taken place). Indeed, given the dispute even among legal scholars as to the most precise definition of attempt, it is impossible that a lay jury could determine whether appellant's acts constituted an attempt without some guidance. See Mims v. United States, supra, 375 F.2d at 148-149 nn.40-41; see also Gregg v. United States, 113 F.2d 687, 690 (8th Cir. 1940); United States v. Coplon, 185

F.2d 629, 633 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

Despite the district court's belief that appellant had consummated an attempt (see 79), there is no doubt that the responsibility of determining whether his guilt of this element had been proved beyond a reasonable doubt could not be taken from the jury. United States v. Singleton, slip op. 1873, 1886-1887 (Nos. 75-1114, 74-1209, 74-1210) (2d Cir. February 13, 1976); see Henderson v. Morgan, 44 U.S.L.W. 4910, 4913 (Sup.Ct. June 17, 1976) (White, J., concurring). Yet the court's charge on attempt was utterly insufficient to provide the jury with the necessary guidance to decide this issue. In order to convict appellant under §2113(a), the jury was required to find that appellant, with the requisite "criminal intent," "attempted" "by intimidation" to take money in the custody of a Federally insured bank. Since the court carefully instructed the jury on the definitions of criminal intent and intimidation, its omission of any definition of attempt permitted the jury to conclude that the issue was not before it or was conclusively proved if the jury found Ms. Martinkovic's testimony credible.* See Kibbe v. Hender-

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*The jury might also have been led to the belief that it need not decide this issue by the following sequence in the court's charge on the essential elements of the crime:

> 3. That the attempt to take money was from the person or presence of one or more persons other than the defendant.
>
> And here, as I recall the evidence, I am not sure there is a dispute here, the Govern-

son, supra, slip op. at 3090. But even if the jury was aware of the need to find an attempt, "the court's instruction did not provide the tools necessary to that task" (Kibbe v. Henderson, supra, slip op. at 3090), for the legal standard for attempt is complex and requires some definition. In this case, assuming arguendo, that the jurors found that appellant went up to the teller, demanded money,* and then refused to accept the envelope, they also were required to decide whether these acts carried the crime "so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for the timely interference resulting in a failure to consummate the crime" (79). Without the above definition,

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(Footnote continued from page 12)

> ment contends the attempt was to take money from Mrs. Martinkovic, the teller at the bank, who testified before you this morning.
>
> (113-114).

While the court probably intended here merely to inform the jury that there was no dispute as to the status of the complainant, its statement may well have led the jury to believe that there was no dispute on the issue of attempt, particularly in view of the court's failure, at any later time during the charge, to define attempt or to inform the jury it must find that appellant's acts had progressed far enough to constitute an attempt. Compare United States v. Singleton, supra, slip op. at 1886-1887. A charge, like the present one, which has the effect of permitting the jury to conclude that they need not find an essential issue since the prosecution has successfully proved it is fundamental error. United States v. Singleton, supra; Kibbe v. Henderson, supra.

*The defense never conceded that appellant made the statement attributed to him by Ms. Martinkovic.

there was no intelligible way for the jury to make its determination on attempt.

The court's failure to define an essential element of the crime was a fundamental error of constitutional dimension (Kibbe v. Henderson, supra), which may be noticed even in the absence of an objection. United States v. Howard, supra, 506 F.2d at 1133 & n.3; United States v. Clark, supra, 475 F.2d at 248-250 (failure to define knowledge, intent, inference); United States v. Fields, 466 F.2d 119 (2d Cir. 1972); Mims v. United States, supra, 375 F.2d at 148 (failure to define attempt); United States v. Squires, 440 F.2d 859 (2d Cir. 1971) (failure adequately to define "knowingly"); see also United States v. Singleton, supra.

Moreover, in this case no consideration of the plain error doctrine is required, for the necessity of defining and charging attempt was repeatedly brought to the court's attention. In addition to the Government's request to charge, defense counsel explicitly requested that the jury be directed to determine whether appellant's conduct had proceeded far enough to constitute an attempt. Further, defense counsel explicitly adopted, and then quoted verbatim, the definition of attempt submitted by the Government. The court's explicit denial of appellant's request to bring the issue before the jury and its later denial of all requests "except as charged" is sufficient to preserve this issue. Cf. United States v. Squires, supra, 440 F.2d 859.

The court's failure directly affected a contested issue

in this case -- whether appellant's conduct was sufficient beyond a reasonable doubt to constitute an attempt. While we anticipate that the Government may argue that this error is "harmless," in light of what they would argue is the persuasive evidence of guilt, there is no doubt that it is error to fail to instruct on an essential element of the crime charged even where the court finds "overwhelming proof" of the element. As this Court recently stated in United States v. Howard, supra, 506 F.2d at 1134:

> When Howard exercised his constitutional right to a jury, he put the Government to the burden of proving the elements of the crime charged to the jury's satisfaction, not to ours or the district judge's. Thus, even if we believe that there was overwhelming proof of the elements not charged, we must still reverse.

See also Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965).

Thus, the case must be reversed with a new trial at which a properly instructed jury can determine whether all the elements of the crime, including attempt, were proved beyond a reasonable doubt.

CONCLUSION

For the above-stated reasons, the judgment of conviction must be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 25, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

David I. Gottlieb